Whitehead Brothers Company and District 65, U.A.W. Case 4-CA-11818

August 31, 1982

DECISION AND ORDER

By Chairman Van de Water and Members Fanning and Zimmerman

On December 16, 1981, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, counsel for the General Counsel filed a brief in opposition, and the Respondent filed a brief in response.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Whitehead Brothers Company, Port Elizabeth, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT fail or refuse to bargain collectively and in good faith with District 65, U.A.W., as the exclusive bargaining representative of the employees in the appropriate unit by: instituting changes in terms and conditions of employment of our unit employees without prior notice to District 65 or without

affording District 65 an opportunity to negotiate and bargain concerning such changes; failing or refusing to negotiate with District 65 concerning the termination of trucking operations at our Port Elizabeth, New Jersey, plant and the effects of such termination on our unit employees; or failing or refusing to furnish District 65 with information and data which is relevant and necessary to its function as bargaining representative. The appropriate unit is:

All production and maintenance employees employed by us at our Port Elizabeth, New Jersey facility, including drivers, clerical employees, and laboratory employees; but excluding all guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL make whole our unit employees for any loss of pay or other benefits, plus interest, caused by our unilateral termination of trucking operations at Port Elizabeth, New Jersey.

WE WILL, upon request, bargain collectively with District 65, U.A.W., concerning the termination of trucking operations at Port Elizabeth, New Jersey, and its effects upon our unit employees, and reduce to writing any agreement reached as a result of such bargaining.

WE WILL promptly furnish District 65 with the study on which we based our conclusion that it would be uneconomical to continue our trucking operations at Port Elizabeth, the costs of the operation, the costs of subcontracting the work of that operation, the names of the subcontractors, and any other figures or information on which we based our conclusion.

WHITEHEAD BROTHERS COMPANY

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge: This case was heard in Bridgeton, New Jersey, on September 21, 1981. The charge was filed on February 2, 1981, by District 65, U.A.W. (herein the Union). The complaint, which issued on March 18, 1981, and was amended on September 18, 1981, alleges that Whitehead Brothers Company (herein Respondent or the Company) violated Section 8(a)(1) and (5) of the National Labor Relations Act, as alleged. The gravamen of the complaint, as

¹ By order dated September 18, 1981, the Regional Director administratively dismissed certain allegations of the complaint.

amended, is that the Company allegedly failed and refused to bargain collectively with the Union as the representative of its employees by: (1) terminating trucking operations at its Port Elizabeth, New Jersey, facility without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain regarding such action; (2) failing and refusing to negotiate with the Union concerning the effects of the termination: and (3) failing and refusing to furnish the Union with the study on which it based its conclusion that it would be uneconomical to continue the operations, and other data supporting the Company's decision to terminate the trucking operations. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel and the Company each filed

Upon the entire record in this case and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a New Jersey corporation, is engaged in the processing of foundry sands and materials at its plant located in Port Elizabeth, New Jersey. In the operation of its business, the Company annually ships products from its Port Elizabeth plant valued in excess of \$50,000 directly to points outside New Jersey. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE BARGAINING UNIT INVOLVED

It is undisputed, and I so find, that the following employees of the Company constitute an unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by the Company at its Port Elizabeth facility, including drivers, clerical employees and laboratory employees; but excluding all guards and supervisors as defined in the Act.

On or about July 14, 1980, the Union was certified by the Board as the exclusive bargaining representative of the employees in the appropriate unit. It is undisputed, and I so find, that since July 14, 1980, the Union has been and is the exclusive representative of said employees.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background: The Company's Trucking Operation Prior to November 20, 1980

Until 1976, the Company relied exclusively on outside trucking companies to ship products to customers from

its Port Elizabeth plant.² In 1976 the Company initiated its own trucking operation at Port Elizabeth, and this operation performed a small portion of the Company's deliveries. The Company began with one truck, and briefly discontinued the operation twice in 1977 (prior to union representation). By October 1980.3 the Company employed six drivers,4 owned seven trailers (five tankers and two dump) and two tractors, and was lessee of five additional trailers. Normally six tractor-trailers were in use at any given time, with the seventh tractor being used as a spare. The Company used its trucks to ship an average of 40 to 50 truckloads per day, which amounted to from 5 to 10 percent of the Company's total shipments. The Company instituted its trucking operation as a convenience to its customers; e.g., the Company might be able to make deliveries at a time when an outside carrier was unavailable. On a few occasions, the Company used its trucks to haul products to its Plowville, Pennsylvania, plant or to pick up machine products from a firm in Connecticut. The drivers were paid trip rates, and received an hourly rate while performing maintenance work.

B. The Company's Decision To Terminate Its Trucking Operation at Port Elizabeth

Since January 1980, and possibly earlier, the Company was engaged in a study of the economics of its trucking operation. Richard Kruback, the Company's vice president for production, testified that the Company monitored monthly computer printout profit-and-loss statements of its trucking operation. The printouts did not purport to show the Company's income from its trucking operation, nor did they show the cost of contracting out delivery work. In October 1979 the Company projected a gross profit for the operation during 1980. However it is evident from the printouts that throughout 1980 the Company was running well below its projections, and that the Company could reasonably anticipate a loss for the year. Kruback and Plant Manager Walter Livingston testified in sum that throughout 1980 the Company was also aware that its trailers had to be replaced. Specifically, the frames were continually cracking, to the point where the trailers were beyond repair. The Company obtained an estimate of the cost of purchasing five new trailers (\$116,975), and, on October 6, Plant Manager Livingston submitted the proposed purchase for management approval.⁵ Vice President Kruback testified that, on receiving the estimate, management concluded that it could not justify the expense, and therefore rejected the proposed purchase. In light of the condition of the Company's trailers, it is evident that this rejection of the proposed purchase was tantamount to a decision to termi-

² If the Company quoted a delivered price for its products, the Company paid the cost of hauling. Otherwise the customer paid the cost. This arrangement continued after the Company commenced its own trucking operation.

³ All dates herein are in 1980 unless otherwise indicated.

⁴ The evidence indicates that the Company may have also employed a relief driver.

⁶ The Company presented in evidence an estimate dated October 13. However, it is evident from the date of Livingston's request that he already knew the cost.

nate the trucking operation. I find that in mid-October the Company arrived at a tentative decision which would soon result in a shutdown of its trucking operation, and that, unless that decision were changed, all that remained was a determination as to the time of the shutdown.

Kruback testified that on November 18 or 19 he and Livingston went over the condition of the trailers, and that, on November 20, management decided to shut down the trucking operation that same day. Kruback instructed Livingston to park the trucks as they returned to the plant. The Company and the Union were engaged in negotiations over an initial collective-bargaining contract. However, the Company did not give the Union any notice of its intention or decision to terminate the trucking operation. Livingston told those drivers who asked that he had orders from the main office to park the trucks, that the decision was made for economic reasons, and that seniority would be followed. (The Company had an existing policy of following seniority in layoffs and recall.) As a result, four drivers were permitted to bump into plant jobs, and two drivers (Ed Navone and Calvin Ennals) were laid off. Four plant employees (Richard Hasher, Joe Robbins, Gerald Kruback, and Richard Hughes) were laid off to make room for the senior drivers. The record is not clear as to whether a relief driver (possibly Charles Sorbeck) was also laid off. Subsequently the Company recalled the laid-off employees. Navone, Hasher, and Robbins returned to work in the plant on January 18, 1980; Kruback returned to work sometime prior to that date; and Hughes and Ennals declined to return. However as plant employees the former drivers earned less than they did during the trucking operation. As for the equipment, the Company retained one dump truck-trailer combination for in-plant use, and sold four tractor-trailer units (the leased tractors being sold on behalf of the lessor). The remaining equipment was inoperative. The Company continued to use the same trucking firms, who now handled all deliveries from the plant.

C. Contacts Between the Company and the Union Regarding the Termination of the Trucking Operation and the Effects of the Termination

The Union and specifically then Area Director Lou Palughi and his assistant, present Area Director Harry Sopuch, learned of the shutdown through telephone calls from driver employees. Palughi was then the Union's chief negotiator. Sopuch, who was concerned about a possible wildcat strike, telephoned Plant Manager Livingston. The plant manager said that he did not know why the trucks were taken off the road, and he advised Sopuch to call Kruback. Sopuch did so. In response to Sopuch's inquiry, Kruback said that the trucks were taken off the road because of economic conditions. Kruback said that the Company was losing money, that it could not compete with trucking firms, and he mentioned the study previously discussed. Sopuch did not then pursue the matter further. Toward the end of the next bargaining session, on November 25, Sopuch asked Kruback (the Company's chief negotiator) why the Company discontinued the trucking operation, the economic reasons, and to whom the work was subcontracted. Sopuch said the Union had a right to negotiate, and he asked the Company to furnish the date including the cost factor if any on which it based its decision. Kruback replied that he did not have the information with him, and that he would not want to give it to the Union even if he had it. At this point the company negotiators, Kruback and Livingston, got up and left the meeting.⁶

By letter dated December 1, Sopuch requested Kruback to furnish:

The study on which you based your conclusion that it would be uneconomical to continue your trucking operation, and whatever other figures you have on which you based this conclusion, including but not limited to the cost to you of the operation; and the cost of subcontracting the operation and the names of subcontractors that would do the operation at that cost.

Sopuch added:

[W]e reiterate our demand that you bargain with us over the decision to terminate your trucking operation over effects of that decision. We consider you laying off the employees as a result of the decision prior to bargaining with us to be failure to bargain in good faith. We therefore demand the immediate recall of the laid off employees.

In its answer to the present complaint, the Company admitted that it terminated trucking operations without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain over the termination. The Company further admitted that on or about December 1, 1980, the Union by letter requested the Company to negotiate over the effects of the termination on unit employees. I find that the December 1 letter constituted in law and fact a demand that the Company bargain with the Union over both the termination and its effects. Even if the Union had not expressly referred to "effects," the Union's demand for immediate recall of the laid-off employees was addressed both to the termination and its effects upon the unit employees, and constituted an initial bargaining proposal regarding both matters.

The next bargaining session took place on December 8. The Company was represented by Kruback, Livingston, and, for the first time, attorney Alfred Hill. The Company had not yet responded to Sopuch's letter of December 1. There were numerous unresolved issues between the parties. Hill asked Palughi to list the issues. Palughi did so, and included the Union's demand for reinstatement of drivers with full backpay. The Company did not respond to this demand. This was the only discussion of the termination or its effects at the December 8 meeting.

⁶ The foregoing findings are based on a composite of the testimony of Sopuch, Palughi, Kruback, and Livingston, the four witnesses who were present at the meeting. Sopuch and Palughi testified that the Company's negotiators walked out without any response. Kruback and Livingston testified concerning Kruback's refusal to furnish the Company's study, but they did not indicate that Kruback said anything else.

By letter dated December 15, company attorney Hill responded to Sopuch's letter of December 1. After discussion of other matters referred to in the letter, Hill stated as follows:

The last point in your letter deals with the discontinuance of the Company's trucking operation. You realize, of course, that the Company always subcontracted in excess of 90 per cent of its trucking needs. The number of trucks and drivers has not remained constant. The Company's trucking operation had been non-profitable. The records clearly corroborate this fact. The subcontractors who traditionally have carried the Company's product have absorbed the balance of the Company's needs and are sharing the work.

As for the employee-truck drivers, some exercised their seniority and bumped into other jobs and are still employed. There could not have been a more fair and equitable manner of treatment of the drivers. Your demand for the immediate recall of the laid-off employees is denied.

Hill did not furnish the "records" referred to in his letter, nor did he identify the "subcontractors" performing the work. There was no further discussion of the termination or its effects at any bargaining session. By letter dated February 4, 1981, Sopuch told Kruback:

It has just come to our attention that you had unilaterally eliminated the position of relief man at about the same time you eliminated your trucking operation. We hereby demand that you bargain with us over the decision and its effects. We still desire to bargain over the decision to terminate your trucking operation and the effect of that decision.

The Company did not respond either orally or in writing to Sopuch's letter. By letter dated April 30, 1981, Area Director Palughi, responding to a request by attorney Hill, listed 11 unresolved demands. The list did not contain any reference to the termination or its effects. I do not interpret the letter as any abandonment of the Union's prior demands for bargaining concerning these matters. In light of the Union's pending unfair labor practice charge, its prior unequivocal demands, and the Company's response or lack of response, no such inference is warranted. Moreover, it is evident that Palughi was referring to the terms of a proposed contract. In September 1981, shortly before the present hearing, the Company and the Union agreed upon the terms of a contract, and the Regional Director administratively dismissed a related complaint (Case 4-CA-11907) and the other allegations of the present complaint. The agreedupon contract did not purport to deal with the termination or its effects.

D. Analysis and Concluding Findings

As indicated, it is undisputed, and the Company admits, that the Company terminated its trucking operation at Port Elizabeth without prior notice to the Union and without affording the Union an opportunity to nego-

tiate and bargain regarding that action. The General Counsel does not contend that the Company terminated the operation for any discriminatory reason. Therefore the first issue presented is whether the Company violated its bargaining obligations to the Union, the representative of its employees, by failing to give the Union an opportunity to negotiate and bargain with the Company concerning the Company's decision to terminate the trucking operation. The General Counsel, in contending that the Company acted unlawfully, relies on the authority of Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 215 (1974). The Company, arguing that it acted lawfully, relies principally on the authority of the recent Supreme Court decision in First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666 (1981). For the reasons now discussed, I find that the present case is governed by Fibreboard, and that the Company was under a legal obligation to afford the Union an opportunity to negotiate and bargain concerning the Company's decision to terminate the trucking operation.

The Company points out (br. p. 19) that in Fibreboard, the Supreme Court addressed its rationale to the kind of fact situation involved in that case. In First National, the Court, using similar qualifying language, also confined its rationale to the kind of factual situation therein presented. In Fibreboard, the Court defined the fact situation as "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment." The Court held that such "contracting out" or "subcontracting" is a mandatory subject of bargaining. (379 U.S. at 215.) The present case falls within the factual context defined by the Court in Fibreboard. Here, the work in question substantially consisted of the delivery of products by truck from the Port Elizabeth plant to the Company's customers. The Company did not terminate this operation. Rather, the Company continued to perform this function under the same financial arrangements with its customers. As before, products were shipped from Port Elizabeth under the Company's direction and received at destination points under the customer's direction. The only operative change was that instead of the Company's performing a portion of the work with its own employees and equipment the trucking firms who formerly handled 90 to 95 percent of deliveries were now performing all of the delivery work.

In contrast, First National involved an employer's decision "to close a part of its business." The Court held: "The decision to halt work at this specific location [the performance of maintenance work at Greenpark Care Center] represented a significant change in [First National's] operations, a change not unlike opening a new line of business or going out of business entirely." No comparable change is involved in the present case. The Company had used its own drivers for only a portion of its delivery operations. As the Company itself pointed out, the Company previously stopped utilizing its own employees and equipment for deliveries, only to resume doing so after short intervals. However, there is one major factor which was not present in either Fibreboard or First National. In the present case, unlike the two Supreme Court

cases, the Company's decision to terminate its trucking operation necessarily involved rejection of a proposed capital investment; i.e., the purchase of five new trailers. Concomitantly, in light of the condition of the Company's trailers, a decision to continue the operation would have necessitated the purchase of new equipment. However, in First National the Supreme Court explicitly stated that "we do not believe that the absence [in that case] of 'significant investment or withdrawal of capital' is crucial." Rather as indicated, the Court regarded the nature of the employer's decision, rather than the amount of investment involved, to be the determinative factor. Moreover, as the Company itself demonstrated in the present case, the Company did not base its decision solely on the cost of new trailers. Rather, the Company took into consideration all of the costs of its trucking operation, including direct and indirect labor costs. These are matters which are particularly appropriate for collective bargaining. See Fibreboard, 379 U.S. at 213-214. In contrast, the employer's decision in First National turned exclusively on its unsuccessful negotiations with Greenpark over the price of First National's services. In sum, the present case involved not only a question of capital investment, but also a determination as to whether unit work should be transferred to another group of employees; i.e., the employees of outside trucking firms. The Company's unilateral disposition of this question had an immediate and vital effect on the wages and jobs of unit employees. Specifically, that disposition resulted in layoffs, displacement, and substantial loss of wages.

The Company argues (br. pp. 18-19) that the viability of Fibreboard was eroded by subsequent Board and circuit court decisions, and suggests that, in light of First National, it is questionable whether Fibreboard is still the law. I find this argument without merit. As discussed herein, the Supreme Court made clear in First National that it was dealing with a situation which differed substantially and significantly from that involved in Fibreboard. The cases principally relied on by the Company (cited at br. p. 18) each involved the closure or sale of a significant facility or portion of the employer's business; i.e., situations even more favorable to the employer's position than that involved in First National. See, in particular, the Board's discussion of such cases in General Motors Corporation, GMC Truck & Coach Division, 191 NLRB 951 (1971). It is possible that over the years, in light of changing patterns in labor relations or evolving case law, there might be an erosion of the doctrines of a once-leading Supreme Court decision. However, it is unlikely that such erosion would take place immediately in the wake of that decision. Therefore I find particularly significant several circuit court decisions which issued shortly after Fibreboard, and which necessitated consideration or reconsideration of the cases in light of Fibreboard. These cases are discussed in General Motors, supra. The Board observed that: "Consistent with the expressly restricted scope of Fibreboard, the courts have sustained the Board's position in subcontracting cases sciting N.L.R.B. v. American Manufacturing Company of Texas, 351 F.2d 74 (5th Cir. 1965); and N.L.R.B. v. Johnson, d/b/a Carmichael Floor Covering Co., 368 F.2d 549 (9th Cir. 1966)], but rejected Board decisions requiring bargaining over more elemental management decisions, such as plant closings and plant removals" (citing, inter alia, N.L.R.B. v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), cert. denied 382 U.S. 1011; and N.L.R.B. v. Royal Plating and Polishing Co., Inc., 350 F.2d 191 (3d Cir. 1965). Adams Dairy involved "a basic operational change [which took] place when the dairy decided to completely change its existing distribution system by selling its products to independent contractors." (350 F.2d at 111.) In Royal Plating, the employer shut down one plant of a two-plant operation. Carmichael Floor Covering involved a fact situation similar to that presented in Fibreboard. However, American Manufacturing, unlike the other cases discussed by the Board or cited by the Company in its brief, involved a fact situation which was substantially similar to that in the present case. The employer, a manufacturer of oilfield pumping equipment, maintained an extensive transportation department for the delivery of its products to customers scattered throughout the United States and Canada. Without consultation or discussion with the bargaining representative, the employer abolished its transportation department, contracted all of its motor truck transportation to a trucking firm, laid off or transferred its drivers (apparently on the basis of seniority), and subsequently sold all of its trucks and related equipment. As the Court put it, the employer "was now out of the transportation business. Or so it thought." The Court upheld the Board's finding that the employer's conduct was discriminatorily motivated, and therefore violative of Section 8(a)(3) of the Act. However, the Court specifically held that, even in the absence of a discriminatory motive, the employer was obligated to bargain over its decision to "subcontract" the trucking work. "Quite apart from anti-union conduct, or here the claim of economic justification, the decision to subcontract work is a subject for mandatory bargaining. Any doubt which may have existed was put to rest by [Fibreboard]." (351 F.2d at 80.) In the present case, as in Fibreboard and American Manufacturing, the Employer was obligated to bargain over its decision to "subcontract" unit work, i.e., to replace unit employees with those of an independent contractor or contractors to do the same work under similar conditions of employment.

In Westinghouse Electric Corporation (Mansfield Plant), 150 NLRB 1574 (1975), a Board decision which also issued shortly after Fibreboard, the Board held that, in the circumstances of that case, the employer "did not violate the statutory bargaining obligation by failing to invite union participation in individual subcontracting decisions" involving work which might otherwise have been performed by unit employees. In Westinghouse, the employer had a long-established and recurrent practice of contracting out work, and, over the years, had awarded thousands of such subcontracts. The Board interpreted Fibreboard as allowing, even with respect to a mandatory subject of bargaining, for "circumstances which the Board could or should accept as excusing or justifying unilateral action." The Board found such circumstances in Westinghouse, specifically that: (1) the recurrent contracting out of the work in question was motivated solely by economic considerations; (2) it comported with the

traditional methods by which the employer conducted its business operations; (3) it did not during the period in question vary significantly in kind or degree from what had been customary under past established practice; (4) it had no demonstrable adverse impact on employees in the bargaining unit; and (5) the Union had the opportunity to bargain about changes in existing subcontracting practices in general negotiating meetings. For "all these cumulative reasons," the Board concluded that the employer did not violate the Act. Recently (but prior to the Supreme Court decision in First National), the Third Circuit Court of Appeals had occasion to interpret and apply Westinghouse in Equitable Gas Company v. N.L.R.B., 637 F.2d 980 (1981). The court held that its "balancing analysis," theretofore applied to cases involving plant closings, was also applicable to cases involving subcontracting of unit work. See also ABC Trans-National Transport, Inc. v. N.L.R.B., 642 F.2d 675, 679 (3d Cir. 1981). Under this analysis, there is an initial presumption that issues of subcontracting and partial closings are mandatory subjects of bargaining, but this presumption can be overcome if it appears that the employer's interests outweigh the Union's interest in a given situation. Equitable Gas involved the subcontracting of unit work. The court, invoking its balancing analysis, applied the five criteria utilized by the Board in Westinghouse. The court, in disagreement with the Board, held that all five criteria were present. Therefore, the court denied enforcement of the Board's Decision and Order directing the employer to bargain over such subcontracting.

In First National, the Supreme Court took note of the Third Circuit's approach to these cases. It is probable that the court of appeals will wish to reconsider its balancing analysis in light of First National. Assuming (as indicated by the court in Equitable Gas) that the criteria utilized by the Board in Westinghouse are applicable to all subcontracting cases in order to determine the employer's obligation, I would nevertheless find a violation in the present case, because only one of those criteria (economic motivation) is here present. The second and third criteria are not present, because for several years the Company had consistently used its own driver to perform a substantial portion of its delivery work. The fourth criterion is not present, because the Company's unilateral actions resulted in layoffs, displacement, and substantial loss of wages for unit employees. As to the fifth criterion, the Union had no reason to anticipate any change in the Company's practices, and consequently had no opportunity to bargain about such changes.

As the Company's termination of its trucking operations at Port Elizabeth was a mandatory subject of bargaining, it follows that the Company also violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the information and data requested orally and in writing by the Union. Such information and data was relevant to the termination and the Company's decision to terminate the trucking operations, and was both relevant and necessary in order to enable the Union to negotiate and bargain meaningfully and intelligently concerning both the termination and its effects on the unit employees. *Production Molded Plastics, Inc.*, 227 NLRB 776, 786–787 (1977), enfd. 604 F.2d 451 (6th Cir.

1979). Some but not all of the requested information was presented in evidence in this proceeding. However, this belated proffer does not excuse the Company's unlawful conduct, nor does it constitute an adequate substitute, either in law or fact, for direct and prompt compliance with a proper request for information by the bargaining representative. Production Molded Plastics, supra, 227 NLRB at 786; see also Air Express International Corporation, 245 NLRB 478 (1978), enfd. in pertinent part 659 F.2d 610 (5th Cir. 1981).

Regardless of the Company's obligation to bargain concerning its decision to terminate trucking operations, the Company nevertheless violated Section 8(a)(5) and (1) of the Act by failing to give the Union prior notice of that decision, in order to afford the Union adequate and meaningful opportunity to negotiate concerning the effects of that decision. See N.L.R.B. v. Royal Plating and Polishing Co., Inc., supra, 350 F.2d at 196. The Company had ample time to afford such an opportunity. As heretofore found, the Company for all practical purposes arrived at its decision more than a month before the actual termination. The Company does not dispute that it was legally obligated to afford the Union such opportunity. See also First National Maintenance Corp., supra at fn. 15. I find upon consideration of the evidence that the Company unlawfully failed and refused to bargain over the effects of its decision on the unit employees. Initially, as heretofore discussed, the Company did not even inform the Union of the termination. Rather, as the Company concedes that (br. p. 32) the Company not only unilaterally terminated trucking operations, but also unilaterally imposed the effects on the unit employees in accordance with its own concept of fairness. Although, as admitted by the Company, the Union requested effects bargaining in its letter of December 1, the Company ignored that request at their next negotiating session on December 8. Instead, through a letter from its attorney (dated December 15), the Company categorically rejected the Union's demand for immediate recall of the laid-off employees, and refused to deviate from its previously imposed unilateral resolution of the problem, without suggesting that there was any possibility of further negotiation regarding the matter. This did not constitute compliance with the Company's bargaining obligations under the Act. "Faceto-face negotiations" between the "bargaining principals" is "an elementary and essential condition of bona fide bargaining." Aaron Newman, et al. d/b/a Colony Furniture Company, 144 NLRB 1582, 1589 (1963). "A respondent must do more than merely give notice and an opportunity to bargain: its conduct must reflect an intention to reach agreement. Otherwise 'form, rather than substance, becomes the determinative factor in deciding whether the bargaining obligation has been fulfilled' [resulting in] ritualistic, pro forma bargaining without meaningful exchange." Dilene Answering Service, Inc., 257

⁷ The Company did not present in evidence any figures which would indicate the cost of subcontracting the trucking information. Vice President Kruback did not claim in his testimony that the printouts and estimate which were presented in evidence constituted the entire basis on which the Company made its decision.

NLRB 284 (1981).8 In the present case, the Company unlawfully acted without prior notice to the Union, and then compounded its unlawful conduct by foreclosing any meaningful negotiations over the matter.

CONCLUSIONS OF LAW

- 1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. All production and maintenance employees employed by the Company at its Port Elizabeth, New Jersey facility, including drivers, clerical employees, and laboratory employees, but excluding all guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.
- 4. At all times material the Union has been and is the exclusive collective-bargaining representative of the employees in the unit described above.
- 5. The Company has been and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by terminating trucking operations at its Port Elizabeth facility without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain with respect to such matter, by failing and refusing to bargain with the Union concerning the effects of the termination on unit employees, and by failing and refusing to furnish the Union with requested information which is necessary for, and relevant to, the Union's performance of its function as bargaining representative.
- 6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and from like or related unlawful conduct to bargain upon request with the Union concerning its termination of trucking operations at Port Elizabeth and the effects of such termination on the unit employees, to furnish the Union with the requested information, and to post an appropriate notice. The General Counsel has not requested an order which would require the Company to resume its trucking operations. However, the General Counsel requests a remedy as provided in Transmarine Navigation Corporation and its Subsidiary, International Terminals, Inc., 170 NLRB 389 (1968). I find that such a remedy is warranted, with modifications in light of the particular facts of the present case. I shall recommend that the Company be ordered to make whole unit employees for

any loss of income and benefits they may have suffered by reason of the termination of trucking operations and consequent layoffs and displacement of unit employees. Backpay shall be computed in accordance with the formula approved in F. W. Woolworth Company, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in Florida Steel Corporation, NLRB 651 (1977).9 Backpay shall commence from November 20, 1980, until the occurrence of the earliest of the following conditions: (1) the date the Company bargains to agreement with the Union concerning the termination of trucking operations at Port Elizabeth and its effects on unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the Company's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁰

The Respondent, Whitehead Brothers Company, Port Elizabeth, New Jersey, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Failing or refusing to bargain collectively and in good faith with District 65, U.A.W., as the exclusive bargaining representative of the employees in the appropriate unit by: instituting changes in terms and conditions of employment without prior notice to said Union or without affording said Union an opportunity to negotiate and bargain concerning such changes; failing or refusing to negotiate with said Union concerning the termination of trucking operations at its Port Elizabeth, New Jersey, plant and the effects of such termination on unit employees; or failing or refusing to furnish said Union with information and data which is relevant and necessary to its function as bargaining representative.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.
- 2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:
- (a) Make whole unit employees for any loss of pay or other benefits caused by Respondent's unilateral termination of trucking operations at Port Elizabeth, New Jersey, in the manner and for the period set forth in the section of this Decision entitled "The Remedy."
- (b) Upon request bargain collectively with District 65, U.A.W., concerning the termination of trucking operations at Port Elizabeth, New Jersey, and its effects upon

⁸ In Dilene, as in the present case, the employer avoided discussing the matter in question at a regular bargaining session, but instead, communicated its position by mail in a "take it or leave it" manner. In Dilene, unlike the present case, the employer gave advance notice of its intention. Nevertheless, the Board found that the employer "engaged in ritualistic pro forma bargaining which does not satisfy the requirements of Section 8(a)(5) of the Act." A fortiori, the Company also did not satisfy its obligation under Sec. 8(a)(5).

See, generally, Isis Plumbing & Heating Co., 138 NLRB 716, 717-721 (1962).

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

the unit employees, and reduce to writing any agreement reached as a result of such bargaining.

- (c) Promptly furnish said Union with the study on which it based its conclusion that it would be uneconomical to continue its trucking operations at Port Elizabeth, the costs of the operation, the costs of subcontracting the work of that operation, the names of the subcontractors, and any other figures or information on which Respondent based its conclusion.
- (d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.
- (e) Post at its Port Elizabeth, New Jersey, plant copies of the attached notice marked "Appendix." Copies of

said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by